SUBJECT INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED FOR REVIEW	2
CONSTITUTIONAL PROVISIONS AND GEORGIA LAW INVOLVED	3
STATEMENT OF CASE	3
MANNER OF RAISING FEDERAL QUESTIONS	8
SUMMARY OF REASONS FOR ALLOWANCE OF WRIT	9
ARGUMENT OF REASONS FOR ALLOWANCE OF WRIT	9
CONCLUSION	14
APPENDIX	15
CERTIFICATE OF SERVICE	20

TABLE OF CASES

BROXSON v. WAINWRIGHT, 5th Cir. 1967, 372 F.2d 944	11
BUSBY v. HOLMAN, 5th Cir. 1966, 356 F.2d 75	10
COM. OF PENNA. ex. rel. HERMAN v. CLANDY, 1956, 350 U.S. 116, 76 S.Ct. 223, 100 L.Ed 126	11
FORTSON v. STATE, 96 Ga. App. 350	10
FOSTER v. STATE, 22 Ga. App. 109 (2)	10

TABLE OF CASES (Continued)

	Page
GRIFFIN v. STATE, 12 Ga. App. 615, 617, 77 S.E. 1080	10
JOHNSON v. ZERBST, 304 U.S. 458	12
KERCHEVAL v. U.S., 274 U.S. 220, 223, 47 S.Ct. 852, 71 L.Ed 1009	10
KING v. STATE, 91 Ga. App. 388, 390, 85 S.E. 637	10
MACHIBRODA v. U. S., 368 U.S. 487, 493, 82 S.Ct. 510, 7 L.Ed 2d 473	10
MOONEY v. HOLOHAN, 294 U.S. 103, 79 L.Ed 791, 55 S.Ct. 340	11
MURPHY v. WAINWRIGHT, 5th Cir. 1957, 372 F.2d 942	11
SHELTON v. U. S., 356 U.S. 26, 78 S.Ct. 563, 2 L.Ed 2d 579	11
SHELTON v. U. S., 7th Cir. 1961, 292 F.2d 346	11
SMITH v. STATE, 64 Ga. App. 312, 313, 13 S.E. 2d 96	10
STRICKLAND v. STATE, 199 Ga. 792	10
U. S. ex rel McGRATH v. LA VALLEE, 2nd Cir. 319 F.2d 308	11
U. S. v. TATEO, 214 F.Supp. 560	10,12
WALEY v. JOHNSTON, 1942, 316 U.S. 101, 62 S.Ct. 964, 86 L.Ed 1302	10
WALKER v. JOHNSTON, 312 U.S. 275 (4)	11
WEIR v. U. S., 5th Cir. 1966, 363 F.2d 29	11
WELCH v. STATE, 63 Ga. App. 277, 280, 11 S.E. 42	10
WRIGHT v. DICKSON, 9th Cir. 1964, 336 F.2d 878	11

IN THE

Supreme Court of the United States

October Term 1968

NUMBER_____

AMBRY D. ALLEN, JR.,

Petitioner,

—v.—

THE STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

Ambry D. Allen, Jr. petitions this Court for a writ of certiorari to review the judgment and opinion of the Court of Appeals of Georgia entered in the Case of AMBRY D. ALLEN, JR. v. THE STATE OF GEORGIA on the 3rd day of September, 1968.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals of Georgia are as yet unreported but are appended hereto, (Appendix) and unofficially reported in 118 Ga.

App. 354, (Advance Sheet of November 7th 1968); 163 SE2d 839 (Advance Sheet of November 28th 1968).

JURISDICTION

The judgment of the Court of Appeals of Georgia was dated and entered on September 3rd 1968. A rehearing in said judgment was denied by the Court of Appeals of Georgia on September 18th 1968. Petition For Writ of Certiorari to the Court of Appeals of Georgia was filed in the Supreme Court of Georgia and was denied on November 7th 1968, Motion For Reconsideration being denied on November 21st 1968, (Appendix). The jurisdiction of this Court is invoked under U.S.C. 1257 (3) since a right, privilege, and immunity is specially claimed under the Constitution of the United States of America.

QUESTION PRESENTED FOR REVIEW

The question presented is whether when the prosecuting Court Official promises petitioner and petitioner's attorney, prior to plea of Guilt, (a) that petitioner would be transferred within fifteen (15) days after the plea from federal custody to state custody through arrangements previously made with the late Honorable Robert F. Kennedy, the then United States Attorney General, and (b) promises that petitioner shall receive a total five year (5) jail sentence from the sentence in Court; the petitioner entering his plea of Guilt under these inducements and promises, the sentencing Judge thereafter making it known in open Court that the sentence would be a total of seven (7) years in jail; the prosecuting court official then assuring and guaranteeing petitioner that two of these seven (7) years would be remitted, and petitioner not withdrawing his plea of

guilt due to these assurances and promises and petitioner receiving a seven year (7) jail sentence; constitutes a free and voluntary confession of guilt by plea without violation of due process of law, none of the assurances and promises being fulfilled.

CONSTITUTIONAL PROVISIONS AND GEORGIA LAWS INVOLVED

The Fourteenth Amendment to the Constitution of the United States of America provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

The 1933 Code of Georgia as amended, Section 38–411 provides:

> "To make a confession admissible, it must have been made voluntarily, without being induced by another, by the slightest hope of benefit or remotest fear of injury."

The Constitution of the State of Georgia Article I, Section I, Paragraph III, 1933 Code of Georgia as amended Section 2–103 provides:

> "No person shall be deprived of life, liberty, or property, except by due process of law."

STATEMENT OF CASE

Petitioner, Ambry D. Allen, Jr., was indicted by the Grand Jury of Fulton County, Georgia on February 22nd 1963, Honorable Lester G. Maddox being the Foreman thereof, and charged in several indictments alleging Larceny of Automobiles, among these being Indictment No. 83334 which alleged two previous felony convictions in 1951, there being eight separate indictments returned and numerous counts involved in this

case. Petitioner during 1964, while serving a federal sentence, had assurances and promises from the late William T. Boyd, then Solicitor General of the Atlanta Judicial Circuit, that if petitioner would plead Guilty in Fulton County, Ga. to all State charges, that petitioner would be transferred within fifteen (15) days after the plea from federal custody into state custody, and petitioner would receive a total sentence of five (5) years on all the pending Fulton County charges. On August 4th 1964, Habeas Corpus Ad Prosequendum was initiated by said Solicitor General for the purpose of having petitioner produced from the United States Penitentiary, Atlanta, Georgia to the Fulton Superior Court at 9:30 o'clock a.m. on August 5th 1964, said Writ of Habeas Corpus being issued. (R10-13) On August 5th 1964, the said Solicitor General made the same assurances and promises to petitioner and petitioner's attorney explaining that prior arrangements had been made through the late Honorable Robert F. Kennedy, the then United States Attorney General to have petitioner transferred, within fifteen (15) days after the plea, from federal custody into state custody. The attorney employed by petitioner for the plea only, spent about forty minutes with petitioner before and during the plea. Petitioner, on August 5th 1964, withdrew Guilty pleas previously entered when represented by Attorney George G. Finch, and based on the assurances and promises from the said Solicitor General. Petitioner, while represented by Attorney Frank S. French, entered pleas of guilty in Fulton Superior Court to all eight pending indictments, including Indictment No. 83334, (R6-8) the indictment to which petitioner filed his Motion To Withdraw Plea and To Vacate And Set Aside Judgment of Conviction and Sentence. The late

Honorable Stonewall Dyer, Judge, Fulton Superior Court, A.J.C., declined to follow the recommendation of the Solicitor General that petitioner be sentenced to serve only a total of five years, said Judge announcing in open court that petitioner, in addition to a five (5) year sentence, would receive an additional five year sentence to follow, to serve two of those years and the balance suspended. The said Solicitor General at this point assured and promised petitioner, petitioner's attorney and petitioner's brother that if petitioner went through with the plea, that the additional time over and above five years would be remitted and taken care of by him. After the additional two years came into the picture, according to the testimony of Attorney Frank S. French (R94-96) ". . . Mr. Boyd did say in my presence, did say, don't worry about that extra two years." Q. "Who did he say that to?" A. "To A. D. Allen, he says, I can get that knocked off later, but I can't do it right now." Q. "What did A. D. Allen say?" A. "He said, under those circumstances he would enter a plea, take seven years, five years plus two years on the other indictment to follow, plus three years of the remainder of that five years to be suspended . . ." Q. "Did you have any conversation with Mr. Boyd about how he planned to take care of those two years?" A. "No; no, no, I didn't." Q. "But the assurance was made to A. D. Allen, Jr.?" A. "Yes, sir."

After the additional two years came into the picture, according to the testimony of petitioner, (R140-141) Q. "Did Frank French have anything to say to you before sentence was pronounced?" A. "Judge Dyer didn't say anything to me, Mr. Boyd asked the questions. Mr. French, he walked back over and told me,

said you're going to get a seven year sentence. I said "Bill Boyd told me only five year sentence. So Mr. French stepped back, I looked at my brother and I shook my head at him, I was going to change right then, just withdraw my plea immediately, so Mr. Boyd walked over to where I was, said "Don't worry about the two years, I told you I would take care of it, you go ahead and take the sentence, when you get back into Georgia, I will guarantee you that two years will be remitted as soon as you are brought into Georgia. Then my brother walked over to where I was standing, we discussed it, and I said, What do you think. He said, I think Bill Boyd will do exactly what he says he will. I said I believe he will, he would not have come this far, he wouldn't back up. So Mr. Frank, he still insisted I should withdraw my plea right now, he said he would not take it, he would not take anybody's commitment until he had it in writing and he would not go on a man's word. I said I believe when a man went to considerable trouble, considerable expense, I just believe he will do what he says he will do. So I finally agreed. I said—he said, if you believe it, it is you, you go ahead, you're the man that's taking the chance. I said I believe that I will. So Mr. Boyd told me, don't worry about it, I will go right on and do it, as soon as the hearing is over with, I will inform the Federal Bureau that you have received a sentence and when you get into Georgia we will get this straightened out. That is about the whole thing that happened down there in court that day." The evidence continued that petitioner was not sent back to State custody within fifteen days but completed several years of federal time first, and the two years referred to by Mr. Boyd were not remitted.

After the additional years came into the picture, according to the testimony of Aubrie Joe Allen, Mr. Boyd said (R153-154) A. "Not to worry about the two years, that he would guarantee us that it would be remitted."

Based on the aforesaid inducements, assurances and promises from the said Solicitor General, petitioner did not withdraw his pleas and was sentenced by the aforesaid Judge to serve five to five years on all indictments and counts other than Indictment No. 83334, all these five to five year sentences to run concurrently, and on Indictment No. 83334, petitioner was sentenced to five to five years, to serve two years with balance suspended to follow the other concurrent five to five year sentences. (R14) On August 5th 1967, petitioner completed the service of the five to five year concurrent sentences.

On September 19th 1967, petitioner filed his Motion To Withdraw Plea And To Vacate And Set Aside Judgment of Conviction and Sentence with exhibits, (R15-42) response thereto with exhibits was filed by the Office of the Solicitor General, Atlanta Judicial Circuit. (R43-50)

On October 5th 1967, Evidentiary Hearing was held in Fulton Superior Court, where testimony and exhibits were introduced in behalf of petitioner and the State, (R63-176) and on October 6th 1967, said Motion was overruled. (R51) On October 6th 1967, petitioner filed Motion For New Trial and Rehearing (R52), and after the hearing date was duly continued, on March 21st 1968, said Motion was overruled, (R56) an appeal bond in the amount of $2,000.00 was set and made. (R53)

An appeal was taken to the Court of Appeals of Georgia setting out two enumeration of errors, each

alleging violation of due process of law constitutional rights.

The Court of Appeals of Georgia, on September 3rd 1968, affirmed the trial court, denying relief to petitioner. On September 18th 1968, Motion For Rehearing on the same ground was denied by the Court of Appeals of Georgia.

Petition for Writ of Certiorari tc the Court of Appeals of Georgia was filed in the Supreme Court of Georgia in regard to whether or not petitioner's plea of guilty was voluntarily entered without being induced by another, by the slightest hope of benefit or remotest fear of injury, and whether or not petitioner's constitutional rights were violated in the denial of petitioner's Motion to Withdraw His Plea of Guilt, same being denied on November 7th 1968. (R197) Motion For Reconsideration was denied on November 21st 1968, both motions being without opinion. (Appendix)

MANNER OF RAISING FEDERAL QUESTIONS

In Ground One and Two of petitioner's Enumeration of Errors to the Court of Appeals of Georgia, and by written Motion in the trial court, petitioner presented the question as to whether or not petitioner's plea of guilt was voluntarily entered, without being induced by another, by the slightest hope of benefit or remotest fear of injury, and whether or not petitioner's constitutional rights of due process of law were violated thereby and in not granting petitioner's Motion To Withdraw his plea of guilt. These points were also insisted on in the Petition For Writ of Certiorari to the Court of Appeals of Georgia filed in the Supreme Court of Georgia, and the Motion For Reconsideration thereof.

SUMMARY OF REASONS FOR ALLOWANCE OF WRIT

It is respectfully submitted and strongly urged that grave and important issues concerning the law of confession of guilt are involved in that the Court of Appeals of Georgia ruled that the petitioner in entering his plea of guilt was not misled by reasonable expectation of hope, since his attorney was present and the motion was not timely made, it being respectfully submitted that the evidence discloses that the late Solicitor General of Atlanta Judicial Circuit made various inducements and promises to petitioner, which were participated in and heard by petitioner's attorney and others, petitioner's undisputed exhibit (R175) and (Appendix) corroborating same, and that important constitutional questions are involved concerning the confession of guilt and denial of the right to withdraw said plea. It is respectfully submitted that the ruling under the facts in this case is not consistent with the present federal law concerning confession of guilt, and due process of law, important constitutional questions being involved herein.

ARGUMENT OF REASONS FOR ALLOWANCE OF WRIT

It is respectfully submitted and very strongly urged that the Court of Appeals of Georgia erred in denying petitioner relief in connection with whether or not petitioner's plea of guilt was voluntarily entered, without being induced by another, by the slightest hope of benefit or remotest fear of injury, and whether or not petitioner's Constitutional rights were violated thereby and in not granting petitioner's Motion to withdraw

his plea of guilt. Under the testimony of Attorney Frank S. French (R83-101, 110), petitioner's exhibit one in the lower court (R175) and (Appendix), testimony of J. Robert Sparks (R112-118, 127, 128), petitioner, Ambry D. Allen, Jr., (R129-144, 146), Juanita S. Cousey (R147-148), and Aubrie Joe Allen (R149-155), it is respectfully submitted that hope of benefit was certainly held out to petitioner by another.

Georgia Code Section 38-411 is as follows:

> "Confessions must be voluntary.—To make a confession admissible, it must have been made voluntarily, without being induced by another, by the slightest hope of benefit or remotest fear of injury."

Being *induced by others* by hope or fear is what renders an alleged plea of Guilty or confession of no probative value. See *Griffin v. State*, 12 Ga. App. 615, 617; *Foster v. State*, 22 Ga. App. 109 (2); *King v. State*, 91 Ga. App. 388; *Welch v. State*, 63 Ga. App. 277; *Strickland v. State*, 199 Ga. 792; *Smith v. State*, 64 Ga. App. 312; *Fortson v. State*, 96 Ga. App. 350.

It is well settled that a conviction, whether in a State or Federal Court, which is based upon an involuntary or coerced plea of Guilty, whether it be unfairly obtained or given through ignorance, fear, or inadvertence, is invalid as inconsistent with due process of law. See *Busby v. Holman*, 5th Cir., 1966; 356 Fed. 2d 75; *Waley v. Johnston*, 1942, 316 U.S. 101; 62 S.Ct. 964; 86 L.Ed 1302; *U. S. v. Tateo*, D.C. N.Y. 1963; 214 F. Supp. 560; 565; *Kercheval v. U. S.*, 1927, 274 U.S. 220, 223, 47 S.Ct. 852, 71 L.Ed 1009; *Machibroda v. U. S.*, 1962, 368 U.S. 487, 493, 82 S.Ct. 510, 7 L.Ed 2d 473;

Comm. of Penna. ex rel Herman v. Clandy, 1956, 350 U.S. 116, 76 S.Ct., 223, 100 L.Ed 126; *Wright v. Dickson*, 9th Cir. 1964, 336 Fed 2d 878; *U. S. ex rel McGrath v. La Vallee*, 2nd Cir. 1963, 319 F.2d 308; *Shelton v. U. S.*, 7th Cir., 1961, 292 F.2d 346; *Shelton v. U. S.*, 356 U.S. 26, 2 L.Ed 2d 579, 78 S.Ct. 563; *Murphy v. Wainwright*, 5th Cir. 1967, 372 F.2d 942; *Broxson v. Wainwright*, 5th Cir. 1967, 372 F.2d 944; *Weir v. U. S.*, 5th Cir. 1966, 363 F.2d 29.

One convicted of crime, upon his plea of Guilty, is deprived of a Constitutional right if he was deceived or coerced by the prosecutor into entering a plea of Guilty. *Walker v. Johnston*, 312 U.S. 275 (4); Also see *Mooney v. Holohan*, 294 U.S. 103, 79 L.Ed 791, 55 S.Ct. 340.

It is respectfully submitted that under the undisputed evidence in this case, there were three inducements, promises and commitments made to petitioner by the late Solicitor General, William T. Boyd:

1. That petitioner, after entering pleas of guilty and sentence, would be transferred from federal custody to State custody in not more than fifteen (15) days.

2. That petitioner would receive a total sentence of five (5) years to serve.

3. That the extra two-year sentence to serve proposed and handed down by the Judge would be taken care of and remitted.

It is respectfully pointed out that none of the federal decisions cited by petitioner in his Brief hinged their finding on the timeliness of the Motion To Vacate or withdraw plea, these cases making it crystal-clear that

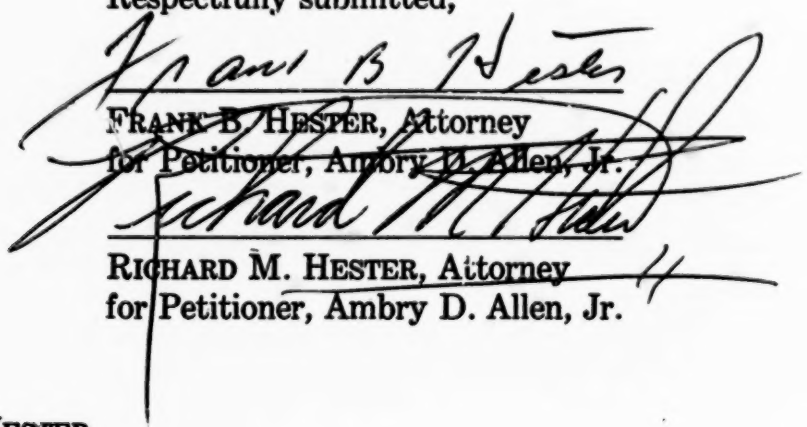
constitutional rights are involved. It should be noted that the United States Supreme Court held that, "a valuable right is never presumed to be waived." (*Johnson v. Zerbst*, 304 U.S. 458 (1937).) It would appear that the Honorable Court of Appeals of Georgia has taken the position that a defendant cannot be induced by another, by the slightest hope of benefit or the remotest fear of injury if the defendant has an attorney. See *United States v. Tateo*, 214 F.Supp. 560. It is urged that the psychological factors and elements which may be reasonably calculated and understood to influence the mind of petitioner were, the late Solicitor General involved made a personal visit to petitioner in Buncombe County Jail in North Carolina along with others, including petitioner's North Carolina Attorney. They discussed the federal sentence involved there, the possibility of withdrawing the federal plea there, said Solicitor indicating that if petitioner cooperated with him, such cooperation might make said Solicitor, Attorney General for the State of Georgia. Petitioner was contacted at the U.S. Penitentiary, Atlanta, Georgia by the then Warden or member of U. S. Bureau of Prisons, Fred Wilkinson, concerning a deal with the late Solicitor General, petitioner was produced on August 5th 1964 in Fulton Superior Court by habeas corpus ad prosequendum initiated by the office of the Solicitor General, Atlanta Judicial Circuit, said Solicitor indicated urgency of entering the plea before Honorable Stonewall Dyer on August 5th 1964, said Solicitor suggested the attorney which petitioner should employ for the plea, said Solicitor promised petitioner and his attorney that after entering the pleas of guilty and sentence, petitioner would be transferred from federal custody to State custody in not more than fifteen days,

arrangements having been made through the late Robert F. Kennedy, the then Attorney General of the United States, that petitioner would receive a total sentence of five years to serve, that the extra two-year sentence to serve handed down by the Judge would be taken care of and remitted. What reasonable inferences can be drawn from all the surrounding facts and circumstances involved under the evidence in this case? Can it be said that under the evidence in this case the petitioner was not induced by another to enter the plea with hope of benefit and that the presence of an attorney made everything right?

CONCLUSION

It is respectfully submitted that the decision and judgment of the Court of Appeals of Georgia in not affording petitioner the right to withdraw his plea of guilt under the facts in this case is contrary to due process of law and the constitutional rights thereunder, and the judgment of the Court of Appeals of Georgia should be vacated, the petitioner granted the right to withdraw his plea under Fulton Superior Court Indictment No. 83334, and the case remanded to that Court for further proceedings in compliance therewith.

Respectfully submitted,



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APPENDIX

In the Court of Appeals of Georgia (118 Ga. App. 354); (163 SE2d 839)

43749. A. D. ALLEN, JR. v. THE STATE H–58 HALL, Judge.

An indictment was returned against the defendant in February 1963 for larceny of an automobile, alleging two previous felony convictions in 1951. The indictment was one of several to which the defendant pleaded guilty and was sentenced at the same time in August 1964. On the other indictments the defendant received 5-year sentences to be served concurrently. On this indictment he was sentenced 5 years with 3 years suspended and 2 years to be served following the concurrent 5-year sentences. In September 1967 the defendant filed his motion to withdraw his plea and set aside the sentence on this indictment. The trial court overruled this motion, and the defendant appeals.

The ground upon which the defendant contends he is entitled to relief from this sentence is in substance as follows: The defendant pleaded guilty to all the indictments, allegedly induced by the Solicitor's promise that he would receive sentences to be served for a total of five years. At the trial the court made known and the defendant's attorney informed him what the court's sentence on this indictment would be and that it would make the total time to be served seven years. Then, before the court sentenced the defendant, the Solicitor promised him that he, the Solicitor, would have the two years remitted, and upon this promise the defendant signed the plea of guilty on this indictment rather than withdrawing it.

It appears that the ground of this motion was previ-

ously raised by the defendant in a plea of habeas corpus and decided adversely to him. Allen v. Caldwell, 224 Ga. 47 (159 SE2d 289). Furthermore, while a defendant may move to withdraw a plea of guilty after sentence, he must do so promptly as was done in Griffin v. State, 12 Ga. App. 615, 617 (77 SE 1080). It should be remembered that the reason for allowing a defendant to set aside a conviction on a plea of guilty which was induced by hope for leniency offered by public officials, is not primarily to afford the defendant an opportunity to change his mind because the inducement or promises are not fulfilled, but to give effect to the law that only confessions understandingly and voluntarily made have probative value, and not those coercively induced by prosecuting officers in violation of law. See Griffin v. State, supra 622, 624; Welch v. State, 63 Ga. App. 277, 280 (11 SE 42); Smith v. State, 64 Ga. App. 312, 313 (13 SE2d 96).

The record and the argument of the defendant's counsel itself shows that the defendant was represented at the sentencing by competent privately obtained counsel who clearly explained to him that he would be sentenced to serve seven years instead of the five allegedly promised. The defendant argues that because of the assurance of the Solicitor that he, the Solicitor, would have two years of the sentence remitted he did not follow the advice of his attorney to withdraw his plea of guilty, and thereby he was denied effective assistance of his counsel.

The record abundantly shows that the defendant was intelligent and the foregoing facts show that he knowingly and intelligently and by his own affirmative decision and act rejected the advice of his counsel who

insisted that he should withdraw his plea at that time. By his action the defendant waived his right to trial on the issue of his guilt. This refutes his contention that he was deprived of his counsel's assistance and misled by a reasonable expectation of hope. King v. State, 91 Ga. App. 388, 390 (85 SE 637). See also Calloway v. State, 115 Ga. App. 158, 162 (154 SE2d 291).

Judgment affirmed. Bell, P. J., and Quillian, J., concur.

24934. SUPREME COURT OF GEORGIA

Atlanta, November 7, 1968

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

AMBRY D. ALLEN, JR. v. THE STATE

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be here denied. All the Justices concur.

24934. SUPREME COURT OF GEORGIA

Atlanta, November 21, 1968

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

AMBRY D. ALLEN, JR. v. THE STATE

Upon consideration of the motion for a reconsideration filed in this case, it is ordered that it be hereby denied.

FULTON COUNTY
Atlanta, Georgia

WILLIAM T. BOYD
Solicitor General, Atlanta Judicial Circuit
Third Floor Courthouse 30303
Phone JAckson 2-5310, ext. 271

August 5, 1964

Honorable James V. Bennett
Director
Bureau of Prisons
Department of Justice
Washington 25, D. C.

Re: AMBRY D. ALLEN, JR.

Dear Mr. Bennett:

The above named inmate of the U. S. Penitentiary in Atlanta, Georgia is currently serving a federal sentence of three (3) years. You will recall that I talked with you and Deputy Director Fred T. Wilkinson about this case earlier this summer while I was in Washington. The defendant was produced in Fulton Superior Court today pursuant to a writ of habeas corpus ad prosequendum. He entered pleas of guilty to all cases pending against him in Fulton Superior Court involving stolen automobiles and was sentenced by Judge Stonewall Dyer for not less than seven (7) years and not more than seven (7) years. He was then returned to the U. S. Penitentiary in Atlanta.

Pursuant to my conversation with you and Deputy Director Wilkinson, I now request that you designate

the Georgia State Board of Corrections as the place of confinement for the completion of Mr. Allen's federal sentence, and authorize the Warden to release him to State authorities to commence serving his State sentence.

Very truly yours,

/s/ Wm. T. Boyd
WILLIAM T. BOYD
Solicitor General

WTB:js
cc: Hon. Fred T. Wilkinson

CERTIFICATE OF SERVICE

I do hereby certify that I am a member of the Bar of the Supreme Court of the United States, and have this day delivered three (3) copies of this Petition For Writ Of Certiorari to the Court of Appeals of Georgia by personally handing same to Honorable Lewis R. Slaton, District Attorney, Atlanta Judicial Circuit, Fulton County Courthouse, Atlanta, Georgia 30303.

This 4th day of February, 1969.

Frank B Hester

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INDEX TO BRIEF

Page

OPINION BELOW 1

JURISDICTION 1

QUESTION PRESENTED 2

STATEMENT OF THE CASE 3

A. CHRONOLOGY 3

B. THE PETITIONER ADMITTEDLY KNOWINGLY AND VOLUNTARILY ENTERED A PLEA OF GUILTY ON AUGUST 5, 1964 4

C. THE EVIDENCE SUPPORTS A FINDING THAT NO INDUCEMENTS WERE MADE BY THE SOLICITOR GENERAL 5

REASONS FOR NOT GRANTING CERTIORARI 8

A. THE SUPREME COURT OF GEORGIA'S PRIOR RULING ON THE SAME ISSUES NOT APPEALED FROM BECAME THE LAW OF THE CASE AND WAS PROPERLY HELD SO BY THE COURT OF APPEALS OF GEORGIA 8

B. THE MOTION TO VACATE AND SET ASIDE THE JUDGMENT OF CONVICTION AND SENTENCE WAS PROPERLY HELD UNTIMELY MADE SOME THREE YEARS AFTER THE PLEA OF GUILTY AND AFTER BOTH THE PROSECUTING ATTORNEY AND TRIAL JUDGE ARE DECEASED 10

INDEX TO BRIEF—continued

Page

C. THE LOWER COURT DID NOT ERR IN FINDING THAT THE PLEA OF GUILTY WAS FREELY AND VOLUNTARILY ENTERED BY THE PETITIONER UNDER THE FACTS OF THE CASE 11

CONCLUSION 15

CERTIFICATE OF SERVICE 16

TABLE OF CASES

Allen v. Caldwell, Warden, 224 Ga. 47 (1968) 4

Boster Exchange, Inc. v. National Screen Service Corporation, 363 F.2d 571 (1966) 9

Brown v. Beto, 377 F.2d 950, 953 (1967) 10

Dunn v. U.S., 234 F.2d 219 cert. denied 352, U.S. 899, 77 S.Ct. 140, 1 L.Ed. 2d 90 9

Dutton, Warden v. Parker, 222 Ga. 532 11

King v. State, 91 Ga. App. 388 10

Lumberman's Mutual Casualty Company v. Wright, 322 F.2d 759 (1963) 9

Machibroda v. U.S., 368 U.S. 487, 493, 82 S.Ct. 510, 513 (1962) 12

Malone v. U.S., 299 F.2d 254 cert. denied, 371 U.S. 863, 83 S.Ct. 122, 9 L.Ed. 2d 100 10

Marchese v. U.S., 378 F.2d 16, cert. denied 88 S.Ct. 294, 389 U.S. 930, 19 L.Ed. 2d 283, rehearing denied 88 S.Ct. 585, 389 U.S. 1025, 19 L.Ed. 2d 674 9

TABLE OF CASES—continued

Page

Martin v. U.S., 256 F.2d 345, cert. denied 358 U.S. 921, 79 S.Ct. 294 (1958) 12

McClellan v. Heritage, Warden, 234 F. Supp. 219, affirmed 337 F.2d 239 (1964) 9

Rakes v. U.S., 231 F. Supp. 812 (1964) 11

Richards v. Coiner, 290 F. Supp. 922 (1968) 10, 11

Robinson v. U.S., 264 F. Supp. 146 (1967) 9

Sorrenti v. U.S., 306 U.S. F.2d 236, cert. denied 373 U.S. 916, 83 S.Ct. 1306 (1962) 12

Southern Railroad Co. v. Clift, 260 U.S. 316, 318 (1960) 9

U.S. v. Fay, 239 F. Supp. 632, 634, affirmed 365 F.2d 832, cert. denied 386 U.S. 998, 87 S.Ct. 1319, 18 L.Ed. 2d 347 (1967) 10

U.S. v. Folletee, 395 F.2d 721 (1968) 10, 12

U.S. v. Hughes, 325 F.2d 789, 792, cert. denied 377 U.S. 907, 84 S.Ct. 1167, 12 L.Ed. 2d 178 (1964) 14

U.S. v. U.S. Smelting Co., 339 U.S. 186 (7) (1949) 9

U.S. v. Swift & Co., 189 F. Supp. 885, 902 affirmed 81 S.Ct. 1998, 367 U.S. 909, 6 L.Ed. 2d 1249 (1960) 9

Williams v. U.S. 309 F.2d 890 cert. denied 373, U.S. 940, 83 S.Ct. 1545, 50 L.Ed. 2d 694 10

Williamson v. State, 114 Ga. App. 255 10

Wilson v. Ohio River Co., 236 F. Supp. 96 (1964) 9

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

NUMBER 1015

AMBRY D. ALLEN, JR.,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

OPINIONS BELOW

The opinion and judgment of the Court of Appeals of Georgia and the denial of certiorari by the Supreme Court of Georgia without opinion, as yet unreported officially, is appended to the petition.

JURISDICTION

Jurisdiction has been invoked by the petitioner under the provisions of 28 U.S.C.A., Sec. 1257 (3). Jurisdiction is doubted by respondent on the ground that there

is no substantial Federal question presented for review. Cf. Rule 19 (1) (a), United States Supreme Court.

QUESTION PRESENTED

Respondent cannot agree with the wording of the question, as set out in the Petition, because as worded the question assumes as true most material facts which Repondent insists were not proven by the evidence in the proceedings to vacate and set aside the sentence in the Superior Court, and which are also not pertinent to the issues in this case, in view of the full scope of the decision of the Court of Appeals which is sought to be reviewed.

Therefore, Respondent respectfully insists that the entire issue before this Honorable Court can be properly summed up in the following questions:

1. **Whether the Court below erred in ruling that the same ground of the motion was decided adversely to the Petitioner by the Georgia Supreme Court in a Petition for Habeas Corpus previously raised.**
2. **Whether the Court below erred in ruling that the motion to vacate and set aside the sentence was not timely made some three years later and after both the Prosecuting Attorney and Trial Judge were deceased.**
3. **Whether the Court below erred in affirming the trial court's finding that the plea of guilty was entered voluntarily where admittedly:**
   - **(a) The Petitioner's counsel clearly advised him that the Court would impose a sentence of seven years to serve.**

(b) The Petitioner understandingly and voluntarily entered a plea of guilty and rejected the advise of his counsel.

STATEMENT OF THE CASE

The Petitioner states the facts and the chronology of the proceeding in this case in a manner that does not reflect the true status of the issues. His statement alleges as true facts which are amply reflected by the State's evidence and omits material salient portions of the evidence relevant to the State Court's ruling.

In accordance with Rule 40 (3) of this Court, Respondent wishes to give the following statement summarizing relevant points of evidence in the case.

A. CHRONOLOGY

The Petitioner, Ambry D. Allen, Jr., was indicted along with other members of a stolen car ring by the Grand Jury of Fulton County on February 22, 1963, and was charged with twenty-six (26) counts of Automobile Larceny contained in eight indictments. An original plea of guilty was entered by the Petitioner to all charges in Fulton Superior Court before Judge Luther Alverson in the early part of 1963. (R-17) [1]

During a fifteen day grace period allowed by the Court upon the Petitioner's motion before the imposition of sentence, the Petitioner fled the jurisdiction remaining a fugitive from justice until March, 1964. He was captured in North Carolina in March, 1964, pled guilty in Federal Court to interstate transportation of stolen motor vehicles, and was sentenced to serve in the U. S. Penitentiary at Atlanta, Georgia for three years.

[1] R. refers to the original page of the record below. A copy was not made below of the record sent to this court.

(R-46) Subsequently, a Writ of Habeas Corpus Ad Prosequendum was issued to produce the Petitioner in Fulton Superior Court for disposition of the State charges upon the prisoner's request. (R-10 see note 2)

The Petitioner again pled guilty in Fulton Superior Court on August 5, 1964, and was sentenced to seven (7) years to serve that day by Judge Stonewall Dyer, the Court allowing the original plea to be withdrawn prior to sentencing and a new plea entered. (R-14, 29-30)

More than three years later, the Petitioner brought a Petition for Writ of Habeas Corpus on August 22, 1967, in DeKalb County Superior Court and this Motion to Withdraw Plea and Set Aside Judgment of Conviction and Sentence on September 19, 1967, in Fulton Superior Court, both upon the *same ground* that the guilty plea entered was not voluntary and that it was "induced" by alleged promises to him by the then Solicitor General, now deceased. (R-39, 15) The Habeas Corpus Writ was denied in DeKalb County Superior Court and affirmed by the Georgia Supreme Court on January 18, 1968, in *Allen v. Caldwell, Warden,* 224 Ga. 47. After a hearing by a different judge, Judge Dyer also being deceased, the Motion to Withdraw the Plea was denied in Fulton Superior Court on March 21, 1968 and affirmed by the Court of Appeals of Georgia the latter part of 1968.

B. THE PETITIONER ADMITTEDLY KNOWINGLY AND VOLUNTARILY ENTERED A PLEA OF GUILTY ON AUGUST 5, 1964

The evidence is uncontradicted that the Petitioner voluntarily entered a plea of guilty and understood before the trial judge pronounced sentence that he would

receive sentences totaling seven (7) years to serve. Petitioner's attorney stated:

> "Well, the pleas were as I told you, the old pleas were marked out and new pleas entered on all indictments, and then A.D. signed the pleas of guilty, and I signed as his attorney after explaining to him thoroughly what the Court has said, and what the sentence would be which would be seven years to serve." (T-32) [2]

The Petitioner's testimony corroborated this:

> "Mr. French, he walked back over and told me, said you're going to get a seven year sentence." (T-77)

The evidence is uncontradicted that the Petitioner had explained to him clearly that he would be getting a sentence of seven years to serve. (T-77) The evidence is uncontradicted that he understood that a guilty plea could be withdrawn before sentence was passed especially since a prior plea of guilty to the same charges had just been withdrawn a few minutes earlier. (T-77) By his own admissions, he rejected the advice of his counsel and did not withdraw his plea of guilty. (T-77)

C. THE EVIDENCE SUPPORTS A FINDING THAT NO INDUCEMENTS WERE MADE BY THE SOLICITOR GENERAL

More than three years after sentencing and after both the Solicitor General and the Trial Judge are deceased, the Petitioner brought this present action seeking to Vacate and Set Aside the Sentence by alleging that the plea of guilty was "induced" by alleged promises to him by the Solicitor General. In a hearing conducted before a different judge, Judge Dyer being deceased, the Peti-

[2] T. refers to the original transcript page.

tioner's evidence consisted of the testimony of his brother – a convicted automobile thief, his attorney, and himself. Although several persons were mentioned by the Petitioner and his brother as being able to prove the alleged promises, none were produced at the hearing. (R-18, 20, 31, 34) (T-79)

The Statement of Facts in Petitioner's Brief should be considered as only his contentions because even though the primary witnesses for the State were deceased, the evidence produced on behalf of the State amply refuted the allegations. Moreover, the Petitioner's evidence is conflicting in several material areas.

Assistant Solicitor General J. Robert Sparks testified that the appearance of the Petitioner before Fulton County Superior Court Judge Dyer was initiated by the Petitioner. (R-47) (T-53) Sparks testified that the Petitioner initially expressed the wish to plead guilty to all outstanding indictments to him and wanted to know what would be the least sentence Sparks would recommend. (R-47) (T-53) This statement is supported by the Writ of Habeas Corpus Ad Prosequendum (R-10), but is contrary to the Petitioner's testimony. Witness Sparks testified that the then Solicitor General Boyd recommended in open court that Petitioner A. D. Allen receive a sentence of "a total of 7 years to serve." He testified that Solicitor General Boyd had told him during several discussions that seven years was the very least he could recommend to the court. The day before Solicitor General Boyd said if Allen didn't plea to 7 years to serve for Sparks to place the case on the calendar for trial. (R-53) This is supported by the total sentence of 7 years and the affidavit of A. D. Allen:

> "Mr. Boyd told me that since I was pleading guilty in the Fulton Superior Court with all the news media present, he would like me to take a seven year sentence." (R-36)

John Williams testified that he went to the United States Penitentiary, Atlanta, on Solicitor General Boyd's instructions and informed the Petitioner that the least time Mr. Boyd would recommend to the Judge upon a guilty plea would be seven years to serve. The witness testified that he was present at the time the plea was entered before Judge Dyer where Solicitor General Boyd recommended a sentence of seven years to serve. (T-95, 96) (R-45)

The Petitioner's accounts of the sentence promised are conflicting. Where in his previous affidavit he testified that he was requested to enter a plea of guilty to seven years to serve and he agreed to so enter the plea with the understanding that two years were to be removed later while in the office of Solicitor General Boyd, (R-37) his testimony from the stand was that Solicitor General Boyd told him while in Boyd's office that Judge Dyer said he could have five years. (T-72, 77)

The Petitioner's brother testified that the understanding in Boyd's office was that A. D. Allen would get a five year total sentence. He testified in contrast to Petitioner's affidavit that nothing was said about a sentence of seven years until the plea was being entered in the courtroom. (T-88-90) In contrast to the testimony of the State's witnesses, he testified that the Solicitor General recommended five years. (T-91) In contrast to the affidavit and testimony of the Petitioner, he stated that the sentence of seven years was first mentioned in open court

and that the Solicitor General's promise to remit the two years was made in open court. (T-91)

The defense attorney's testimony conflicted with the Petitioner's. He stated there was no agreement to enter a plea of guilty to seven years to serve before the matter arose in open court. (T-42, 44) Furthermore, his testimony that the Solicitor General did not enter a recommendation of seven years to serve is amply refuted by the testimony of the State's witnesses. (T-55, 96)

In summary, the evidence was more than sufficient to support the decision of the Georgia Court of Appeals.

REASONS FOR NOT GRANTING CERTIORARI

A. THE SUPREME COURT OF GEORGIA'S PRIOR RULING ON THE SAME ISSUES NOT APPEALED FROM BECAME THE LAW OF THE CASE AND WAS PROPERLY HELD SO BY THE COURT OF APPEALS OF GEORGIA

In the prior decision of *Allen v. Caldwell, Warden,* 224 Ga. 47 (1968), the Supreme Court of Georgia decided the same issues presently raised in the present petition adversely to this Petitioner. No further action or appeal was taken from the Court's ruling. The Court of Appeals of Georgia, considering the same identical issues in the same case raised by the same defendant, held that the Supreme Court of Georgia's prior ruling was the law of the case. However, the Petitioner's brief ignored this ruling by the lower court.

In like manner in numerous Federal cases, the courts have consistently refused to allow a Petitioner to shop for a favorable forum as was so flagrantly attempted in this present case in the State courts.

In *Marchese,* the court held that where no new matters were presented in a subsequent appeal, the decision on the prior appeal was the law of the case. *Marchese v. U.S.,* 378 F.2d 16, cert. denied 88 S.Ct. 294, 389 U.S. 930, 19 L.Ed. 2d 283, rehearing denied 88 S.Ct. 585, 389 U.S. 1025, 19 L.Ed. 2d 674. This case simply echoed the decision of this court in *Southern Railroad Co. v. Cliff,* 260 U.S. 316, 318 (1960), which held that under the "law of the case" doctrine, an unreversed decision of a question of law or fact made during litigation settles that question for all subsequent stages of the suit. See also, *U.S. v. Swift & Co.,* 189 F. Supp. 885, 902 affirmed 81 S.Ct. 1998, 367 U.S. 909, 6 L.Ed. 2d 1249 (1960); *Wilson v Ohio River Co.,* 236 F. Supp. 96 (1964); *Boster Exchange, Inc. v. National Screen Service Corporation,* 363 F.2d 571 (1966); *Lumberman's Mutual Casualty Company v. Wright,* 322 F. 2nd 759 (1963); *U.S. v. U.S. Smelting Co.,* 339 U.S. 186 (7) (1949).

In *McClellan v. Heritage, Warden,* Judge Hooper rendering the decision for the United States District Court of Georgia held that though there isn't any strict rule of res judicata in habeas corpus proceedings, the principle of law announced by the Court of Appeals on appeal from a judgment denying a petition for a writ of habeas corpus constituted the law of the case in a later proceeding by the same prisoner to obtain a release from imprisonment under the same conviction and sentence. 234 F. Supp. 219, affirmed 337 F. 2nd 239 (1964). In *Robinson v. U.S.,* 264 F. Supp. 146 (1967), the U.S. District Court held that trial courts are not required to entertain second or successive motions to vacate upon the same or identical grounds. *Dunn v. U.S.,* 234 F.2d 219 cert. denied 352, U.S. 899, 77 S.Ct. 140, 1 L.Ed. 2d

90, *Malone v. U.S.*, 299 F.2d 254 cert. denied, 371 U.S. 863, 83 S.Ct. 122, 9 L.Ed. 2d 100, *Williams v. U.S.*, 309 F.2d 890, cert. denied 373, U.S. 940, 83 S.Ct. 1545, 10 L.Ed. 2d 694.

B. THE MOTION TO VACATE AND SET ASIDE THE JUDGMENT OF CONVICTION AND SENTENCE WAS PROPERLY HELD UNTIMELY MADE SOME THREE YEARS AFTER THE PLEA OF GUILTY AND AFTER BOTH THE PROSECUTING ATTORNEY AND TRIAL JUDGE ARE DECEASED

The Georgia Court of Appeals properly held that the Motion to Vacate and Set Aside the Judgment of Conviction and Sentence was untimely made in the present case. The motion was made over three years after the plea of guilty was entered, after both the prosecuting attorney and trial judge are deceased, and after twenty-five counts of automobile larceny were rendered moot by time served leaving only the remaining count.

The Georgia Appellate Courts have held numerous times that where a motion to withdraw a plea of guilty in a criminal case after the sentence is entered in writing and handed to the Clerk, the grant or refusal thereof is in the sound discretion of the trial courts and will not be set aside unless abused. *Williamson v. State,* 114 Ga. App. 255; *King v. State,* 91 Ga. App. 388. This same rule has been held to apply in Federal courts. *U.S. v. Folletee,* 395 F. 2nd 721 (1968); *U.S. v. Fay,* 239 F. Supp. 632, 634, affirmed 365 F.2d 832, cert. denied 386 U.S. 998, 87 S.Ct. 1319, 18 L.Ed. 2d 347 (1967); *U.S. v. Hughes,* 325 F.2d 789, 792, cert. denied 377 U.S. 907, 84 S.Ct. 1167, 12 L.Ed. 2d 178 (1964). In *Richards v. Coiner,*

290 F. Supp. 922 (1968), the Court questioned the good faith of the Petitioner, who raised the issue that the plea of guilty was not entered almost eight years later. See also, *Rakes v. U.S.*, 231 F. Supp. 812 (1964). Even more flagrant, the present issue was raised three years later after both the prosecuting attorney and the trial judge are deceased.

Thus, we submit that where the evidence presented by the Petitioner conflicts within itself and with evidence presented by the State, where the promises allegedly relied upon are attributed to a dead man, and where other witnesses allegedly able to prove such promises were not produced, the trial court did not abuse its discretion in denying the motion to vacate. Moreover, there is a presumption in favor of the validity of sentences, especially where they are passed on pleas of guilty. *Dutton, Warden v. Parker,* 222 Ga. 532.

C. THE LOWER COURT DID NOT ERR IN FINDING THAT THE PLEA OF GUILTY WAS FREELY AND VOLUNTARILY ENTERED BY THE PETITIONER UNDER THE FACTS OF THE CASE

The only undisputed evidence in the case is that the petitioner's competent counsel clearly advised him that the court would impose a sentence of seven years to serve, the Petitioner understood that he had the right to withdraw his plea before imposition of sentence, the Petitioner was allowed to withdraw a previous guilty plea entered more than a year earlier but without a sentence being imposed due to his flight, the Petitioner understandingly and voluntarily entered a new plea of guilty and rejected the advice of his counsel to with-

draw the plea; and the trial judge entered a sentence of seven years to serve in open court.

Even assuming that Petitioner's account of the facts to be true, which we emphatically deny, the facts that are undisputed clearly show that the petitioner freely and voluntarily entered a plea of guilty with all the facts before him including the advice of competent counsel. Since this appears to be the only test, the plea of guilty was clearly voluntary. *Sorrenti v. U.S.*, 306 U.S. F.2d 236, cert. denied 373 U.S. 916, 83 S.Ct. 1306 (1962). Moreover, in light of his previous experiences with criminal Courts, Ambry D. Allen undoubtedly concluded that it was not in his best interest to stand trial. *U.S. v. Follette*, 395 F.2d 721 (1968).

Moreover as pointed out in *Brown v. Beto*, 377 F.2d 950, 953 (1967) no Federal Court has ever held a guilty plea induced by a prosecutor's promise involuntary for that reason alone. The test is whether or not the defendant was aware of the direct consequences of his plea of guilty including any commitments by the prosecutor. As pointed out in *Machibroda v. U.S.*, 368 U.S. 487, 493, 82 S.Ct. 510, 513 (1962), only if the plea is induced by promises which deprives it of a character of a voluntary act is a plea voided. *Martin v. U.S.*, 256 F.2d, 345, cert. denied 358 U.S. 921, 79 S.Ct. 294 (1958). As aptly pointed out in *U.S. v. Follette*, Supra, even a promise of a lesser sentence would not void a plea of guilty where there was no misunderstanding that the trial court would give a greater sentence than recommended. In the present case, the awareness of the facts by the petitioner is undisputed.

The incredibility of the Petitioner's story is exposed

by his own implausibility. While alleging that a guarantee was made by the now deceased prosecuting attorney beyond his power to fulfill that Petitioner would be able to serve his Federal sentence in the State Prison System within 15 days, the issue was first raised some three years later after the Federal sentence had been served. However, not one letter by the Petitioner demanding that he be transferred into State custody or any other believable proof arising during this three year period was submitted at the hearing. No issue was raised during the three year period of any alleged promise of five years to serve or the remitting of two years of the seven year sentence either at the trial, by complaint in letter form to any authority including the deceased Solicitor General Boyd, or by any formal motions. Moreover, the Petitioner's affidavit differs with his sworn testimony on several material points. (Respondent's Statement of Facts, supra.) His alleged reason for entering a guilty plea in Federal Court was his "inability to secure proper witnesses." (R-33) The credibility gap becomes even more apparent upon the realization that only after twenty-five counts of the twenty-six counts of Automobile Larceny were rendered moot by serving some portion of the sentence and after both the Prosecuting Attorney and the Trial Judge were deceased was any issue raised to the final count.

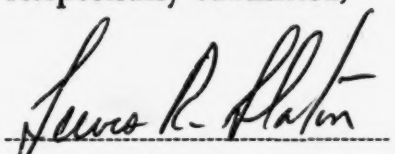
The only credible account of the events occurs from the State's witnesses. They testified that Solicitor Boyd recommended seven years to serve in open court and Williams had previously carried the message to the Petitioner that the least sentence that would be recommended would be seven years. Even then, the setting of the final sentence rested with the court.

This case clearly falls within the decision rendered in *U.S. v. Hughes,* 223 F. Supp. 477, 479, 377 U.S. 907, 84 S.Ct. 1167, 12 L.Ed. 2d 178 (1964). In that case the Court held that the Defendant knowledgeably and with the comprehensive advice of his attorney did enter a voluntary plea of guilty.

CONCLUSION

For the foregoing reasons, Respondent urges that this Court deny the Petition for Certiorari in this case.

Respectfully submitted,



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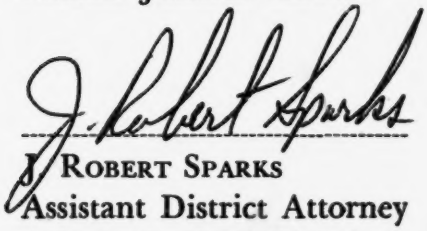

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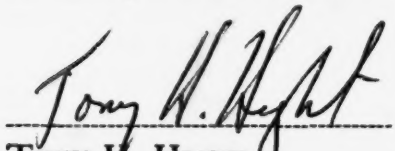

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, and that I have this day deposited in the United States Post Office, Atlanta, Georgia, three copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari with first class postage prepaid, addressed to Mr. Frank B. Hester, Hester & Hester, 803 Fulton Federal Bldg., Atlanta, Georgia 30303, counsel of record for Petitioner.

This 24th day of March 1969.

J. Robert Sparks

J. ROBERT SPARKS
Of Counsel for Respondent